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**The Burden of Freedom: Recent USERRA burdens on employers are not unconstitutional or unprecedented.**

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Some employers and employer associations assert that the Uniformed Services Employment and Reemployment Rights Act (USERRA) was written for the old days when service in the National Guard and Reserve was generally limited to one weekend per month and two weeks in the summer. These employers and associations assert that USERRA is being misused as the traditional strategic reserve transforms into an operational reserve.

This assertion is an incorrect reading of history. Congress enacted the reemployment statute for World War II, and the burden placed on employers today pales in comparison to the burden placed on civilian employers during and immediately after that war. When Japan surrendered on Sept. 2, 1945, the United States had 12 million men and women on active duty in the armed forces.

Within a few weeks, that number was reduced to three million. Even if only half of the nine million returning veterans had civilian jobs to return to, that still amounts to 4.5 million men and women demanding (with the force of federal law behind them) that their pre-service employers reemploy them, even if that meant displacing other employees.

In 1972, when Congress abolished the draft, the Department of Defense (DoD) adopted the "total force policy." Both the executive branch and the legislative branch recognized that in the all-volunteer military it would be necessary to rely increasingly on the Reserve Components for support in contingencies well short of a World War III.

Starting in the 1970s, the seven Reserve Components encouraged their members to participate in military training and service well beyond the minimum requirements, and a long debate ensued as to whether an implied "rule of reason" limited the frequency and duration of military service periods for National Guard and Reserve members. In 1981, the Department of Labor (DOL) bowed to pressure from employer interests and announced a "90-day rule": that the individual Reserve Component member had the right to reemployment after military training or service only if such periods of service did not exceed 90 days in a three-year period. Just a few months later, DOL bowed to pressure from DoD and Congress and rescinded this 90-day rule.

Through the 1970s and 1980s, there were conflicting court decisions as to whether National Guard and Reserve service that exceeded the minimum requirements was protected by the reemployment statute. The Supreme Court finally put an end to that argument by holding clearly and unanimously that the right to time off from one's civilian job for military training or service was not subject to any implied limit or "rule of reason." See *King v. St. Vincent's Hospital*, 502 U.S. 215 (1991).

Three years later, Congress enacted USERRA as a comprehensive rewrite of the 1940 reemployment statute. In section 4312(h) of USERRA, Congress codified the Supreme Court's holding in *King*: "In any determination of a person's entitlement to protection under this chapter, the timing, frequency, and duration of the person's service, or the nature of such training or service (including voluntary service) in the uniformed services, shall not be a basis for denying protection of this chapter if the service does not exceed the limitations set forth in subsection (c) [the five-year limit] and the notice requirements established in subsection (a)(1) and the notification requirements [timely application for reemployment] are met." 38 U.S.C. 4312(h).

The language of section 4312(h) could hardly be clearer, but the clarity is further buttressed by the legislative history: "Section 4312(h) is a codification and amplification of *King v. St. Vincent's Hospital*. This new section makes clear the Committee's intent that no 'reasonableness' test be applied to determine reemployment rights and

that this section prohibits consideration of timing, frequency, or duration of service so long as it does not exceed the cumulative limitations under section 4312(c) and the servicemember has complied with requirements under sections 4312(a) and (e)." House Report No. 103-65, 1994 *United States Code Congressional & Administrative News*2449, 2463.

The transition from a strategic reserve to an operational reserve was largely complete by the time Congress enacted USERRA in 1994. In August 1990, Iraq invaded Kuwait, and President George Herbert Walker Bush began that month calling National Guard and Reserve personnel to active duty, the first significant call-up of the Reserve Components since the Korean War. It was only the rapid victory achieved by American and allied forces that limited the burden on civilian employers during 1990-91.

Yes, the Global War on Terrorism has increased the burden on employers, but this increased burden is certainly not unanticipated or unprecedented.